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IN THE

# Supreme Court of the United States

DELTA FAMILY-CARE DISABILITY AND SURVIVORSHIP PLAN,

*Petitioner*,

—v.—

FRANK REGULA,

*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI


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1.a. Although Respondent purports to show that "[t]he application of the treating-physician rule in the Ninth Circuit is consistent with the decisions of the other Circuit Courts of Appeal," Respondent's Brief at 7, Respondent (1) failed to even address two of the Circuits with which the Ninth Circuit is in conflict, and (2) has badly misread or misinterpreted the decisions made in the other four Circuits. The two Circuits that Respondent does not dispute are in conflict with the Ninth Circuit are the Seventh Circuit, *Wilczynski v. Kemper Nat'l Ins. Co.*, 178 F.3d 933, 938 (1999) and the Sixth Circuit, *Jackson v. Metropolitan Life*, 2001 WL1450811*2 (Oct. 29, 2001).

The decisions from other Circuits do not say what Respondent represents. In *Turner v. Delta Family-Care Disability and Survivorship Plan*, 291 F.3d 1270 (2002), the Eleventh Circuit held that "[t]he *Regula* decision is contrary to the law of this Circuit." *Id.* at 1274. Respondent asserts, however, that *Turner* ignored the Eleventh Circuit's prior decision in *Levinson v. Reliance Standard Life Ins. Co.*, 245 F.3d 1321 (2001). The Eleventh Circuit knows its law better than Respondent: *Levinson* neither adopted nor mentioned the treating-physician rule.

In *Levinson*, the Eleventh Circuit held that the insurer's decision was arbitrary or capricious where *no* physician supported the insurer's denial. *Id.* at 1326-27.[1] *Levinson* does not even mention the treating physician rule in its discussion of whether the insurer's decision was arbitrary or capricious. *Id.* at 1325-27.[2]

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[1] At summary judgment, the insurer relied upon an affidavit of a physician who had not examined Plaintiff. Since the information post-dated the insurer's decision, the Eleventh Circuit did not consider it. *See id.* at 1325-27.

[2] Respondent's argument that the Eleventh Circuit "noted that the District Court had given less weight to the opinion of a reviewing physician and more weight to the treating physician relying upon

*Turner's* statement that the treating-physician rule did not apply in the Eleventh Circuit is a short-hand recognition of its holding in *Jett v. Blue Cross and Blue Shield of Alabama, Inc.*, 890 F.2d 1137, 1140 (1989) (the opinion of a physician who stood to gain as a result of his opinion would not be given deference). Since Respondent's physicians stood to gain financially from additional visits from Respondent as long as they continued to opine that he was entitled to benefits, just as the claimants' physicians did in *Turner* and *Jett*, the Eleventh Circuit is in square conflict with the Ninth Circuit's decision in *Regula*.[3]

Even a cursory analysis of the Fifth Circuit's decision in *Dowden v. Blue Cross and Blue Shield of Tex., Inc.*, 126 F.3d 641 (1997), shows that Respondent has also misrepresented the holding of that case. Respondent states that *Dowden* limited its holding so that it does not apply to disability-benefits claims. First, this is wrong since the Fifth Circuit rejected the treating-physician rule in a disability benefits case three years before *Dowden*. *See Sweatman v. Commercial Union Ins. Co.*, 39 F.3d

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*Donaho*. *Levinson* 245 F.3d at 1329," is irrelevant. Respondent's Brief at 15 (referring to *Donaho v. FMC Corp.*, 74 F.3d 894 (8th Cir. 1996). The portion of *Levinson* which discusses *Donaho* decided whether remand to the insurer was necessary. It referenced *Donaho* only in a historical description of the District Court's decision. *Levinson*, 245 F.3d at 1329-30. As noted above, it neither applied nor approved of *Donaho*, which, in any event, did not deal with the treating-physician rule. *See infra* at 3-4.

[3] Respondent's reliance on *Pegram v. Herdrich*, 530 U.S. 211, 218 (2000) to minimize the financial interests of the treating physician is unavailing. If the professional duties of the treating physician offset the obvious financial incentive for the treating physician, then the same obligation must more than offset the alleged bias of the independent physician. At best, Respondent's point undermines the Ninth Circuit's basis for discounting the opinions of qualified, independent medical experts. *See Petitioner's Appendix* 23a.

594, 601-02 (1994) (rejecting argument that treating physician should be given more weight). Second, the Fifth Circuit's actual holding in *Dowden* is much broader than Respondent represents. The Fifth Circuit held that giving the treating-physician's opinion any extra weight would conflict with the broad discretionary authority of the plan under the arbitrary or capricious standard, regardless of the type of ERISA benefit at issue:

> No evidence in the record exists nor does any legal authority stipulate that an attending physician's opinion should be granted *more weight* than the established policies and procedures of the plan administrator. To grant conclusive weight to the opinion of the attending physician would vitiate the discretionary authority expressly granted to Blue Cross in the contract.

*Dowden*, 126 F.3d at 644 (emphasis added). The Fifth Circuit rejected the treating-physician rule because it cannot be reconciled with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), just as Petitioner argues in this case.

Respondent likewise contends that the Eighth Circuit is not in conflict with the Ninth Circuit even though the Eighth Circuit in *Delta Family-Care Disability and Survivorship Plan v. Marshall*, 258 F.3d 834 (2001) reversed the District Court because it "incorrectly reasoned that the Plan should have accorded greater deference to the opinions of [claimant's] physicians." *Id.* at 842 (distinguishing *Donaho v. FMC Corp.*, 74 F.3d 894 (1996) as not applying to a conflict between *examining* physicians). While the Sixth Circuit in *Jackson* and a district court in the Eighth Circuit have also read *Marshall* as rejecting the treating-physician rule, *see Jackson*, 2001 WL1450811*2; *Brant v. Principal Life and Disability Ins. Co.*, 195 F. Supp. 2d 1100, 1111 (N.D. Ia. 2002), Respondent still contends that *Marshall* did not reject

the treating-physician rule. Respondent's confusion comes from comparing a rule regarding physicians who have only reviewed the records of a claimant as set forth in *Donaho*, and the rule at issue in this case and *Marshall*, which involves conflicting opinions of *examining* physicians. *Marshall* has rejected that the application of the treating-physician rule in ERISA cases, which puts the Eighth and Ninth Circuits in direct conflict in two cases decided under the same Plan.[4]

Respondent contends quixotically that the Fourth Circuit's decision in *Elliott v. Sara Lee Corp.*, 190 F.3d 601 (1999) does not reject the treating-physician rule, but then a page later asserts that the *Elliott* Court erred in not rejecting the treating-physician rule. *See* Respondent's Brief at 10-11. *Elliott* states that it would uphold the denial of benefits under the arbitrary or capricious standard "[e]ven if we were to apply the [treating-physician] rule to the ERISA [disability] claim before us, *which we are not persuaded to do*." *Id.* at 607-08 (emphasis added).[5] The Fourth Circuit has rejected the treating-physician rule in ERISA disability cases.

Ironically, Respondent's thesis, that the treating physician should be deferred to because of its intimate knowledge of Claimant's condition, is at odds with the reasoning of the only other Court that may support Respondent's position. In *Connors v. Connecticut General Life Ins.*

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[4] *Coker v. Metropolitan Life Ins. Co.*, 281 F.3d 793, 799 (8th Cir. 2002) and *Dodson v. Woodmen of the World Life Ins. Society*, 109 F.3d 436, 439 (8th Cir. 1997) do not support Respondent's view, but merely follow *Donaho* because the Plans did not rely on examining physicians in these cases.

[5] Contrary to Respondent's belief, *Sheppard & Enoch Pratt Hosp., Inc. v. Travelers Ins. Co.*, 32 F.3d 120, 126 (4th Cir. 1994) does not concern the treating-physician rule, but rather disapproved following the opinion of a physician who never examined the patient, thus drawing a distinction similar to the Eighth Circuit.

*Co.*, 272 F.3d 127, 135 n.4 (2001), the Second Circuit held that the treating-physician rule was to be used merely to encourage the development of a complete administrative record. Thus, the treating-physician rule would not apply when the Court's review was *de novo*. *Id.* (If this were the Ninth Circuit's view, it would lead to the ironic result that the treating-physician rule would not apply if the District Court applied a *de novo* standard on remand.) Further, since there is no dispute that the administrative record in this case was more than complete, the Second Circuit's logic would not apply to this case. When the cases are read fully and accurately, an active, growing split among the Circuit's on the treating-physician issue is apparent and three of these cases involve Petitioner.[6]

1.b. To minimize the chasm between the Circuits, Respondent recharacterizes the Ninth Circuit's holding to make it appear less drastic a departure from the settled rule in other circuits. An example is Respondent's discussion of the Third Circuit's decision in *Abnathya v. Hoffmann-La Roche, Inc.*, 2 F.3d 40, 46-48 (3d Cir. 1993), on pages 9-10 of Respondent's Brief. Respondent contends that the Third Circuit applied the treating-physician rule *sub silentio* in that case because it rejected a conclusory opinion of a treating physician in favor of a more detailed report from an independent physician that examined the plaintiff in that case. But

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[6] With respect to the Third Circuit, Respondent does not address the fact that the Third Circuit's language in *Skretvedt v. E.I. DuPont de Nemours & Co.*, 268 F.3d 167, 184 (3d Cir. 2001) is *dicta* because there was no conflict between physicians in that case. Thus, the rule in the Third Circuit is still, as expressed in *Abnathya v. Hoffman-LaRoche, Inc.*, 2 F.3d 40, 46-48 (3d Cir. 1993), that the Plan Administrator may reasonably choose between the conflicting opinions of examining physicians. *See infra*, at 5-6. *Skredtvedt* does signify, however, the growing confusion in the federal courts on this issue.

these are exactly the facts we have in this case and the Ninth Circuit reached a contrary result.

In this case, the majority did not discuss the relative merits of the doctor's reports. But Judge Brunetti in his dissent, Petitioner's Appendix (Pet. Ap.) 42a-43a, and the District Court *id.* at 58a-59a, concluded that the reports that the Plan relied upon were more detailed and more consistent than the reports submitted by Claimant and showed, in some instances, a bias of the physician to opine in *Regula's* favor without basis. Indeed, Claimant's physician *changed her opinion in Claimant's favor only after benefits were discontinued. Compare Pet. Ap.* 50a *with Pet. Ap.* 51a; *see Pet. Ap.* 58a-59a. If the rule in *Abnathya* was the treating-physician rule, the Ninth Circuit would have entered judgment for the Plan as the Third Circuit did in *Abnathya. See also Orvosh v. Group Ins. for Salaried Employees of Volkswagen of Am.*, 222 F.3d 123, 130 (3d Cir. 2000) (specifically permitting Plan to rely on an "equivocal" report of consulting physician which conflicted with the opinion of Claimant's physician). These divergent decisions cannot be harmonized as Respondent suggests.

The same is true with the Respondent's attempt to reconcile the Eighth Circuit's decision in *Marshall* with the treating-physician rule. While Respondent claims that *Marshall* effectively applied the rule because it reviewed the record "as a whole," it is clear that the Eighth Circuit never showed any deference to the opinions of Claimant's physicians in *Marshall* even though they were in open conflict with the opinions of the physicians that the Plan found more persuasive. *Marshall*, 258 F.3d at 842.

The Ninth Circuit's decision is drastic departure from a settled cross-Circuit consensus which rejects more complete, more consistent reports in favor of those of the Claimant's physician who has a pecuniary interest in

Respondent's successful retention of benefits. Respondent's efforts to hide the effect of the Ninth Circuit's decision reflects his true understanding that the Ninth Circuit's decision has created a major conflict.

2. Respondent's reference to public disability programs that adopt or use the treating-physician rule only reinforces Petitioner's point that there is a stark contrast between private disability plans, which are permitted to decide what benefits to provide and under what terms to provide them, *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 91 (1983); *Inter-Modal Employee's Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510, 515 (1997) (quoting *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985)), and the highly regulated nature of public disability plans, such as Social Security.[7]

In fact, with regard to the only two private benefit systems referenced in Respondent's brief, both the law at issue in *Rush Prudential HMO, Inc. v. Moran*, No. 00-1021 (2002) and the Department of Labor's ERISA claim regulations, *neither* require deference to a treating physician. Rather, they both involve systems where, in the event of a conflict, an *independent physician's* opinion shall control or at least be considered. *See Moran*, slip op. at 3; 29 C.F.R. §2560.503-1(h)(4) (referring to § 2560.503-1(h)(3)(iii)); Pet. Ap. 82a-84a. Neither Respondent, nor the Ninth Circuit, explain how the regulation's requirement for independent review can be reconciled with the Ninth Circuit's holding that deference must be paid to the treating physician. Thus, the Ninth Circuit's judicial rule-making under the aegis of "federal

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[7] *Amicus Curiae* The ERISA Industry Committee points out that while an overwhelming majority of ERISA disability benefit claims are approved, less than half of Social Security Act disability claims are approved. Brief of *Amicus Curiae* The ERISA Industry Committee at 4-5. Thus, there may be a practical reason for this distinction as well.

common law" cuts against ERISA's calculated decision to allow private benefit plans to define their own scope.[8] *See White v. Principi*, 243 F.3d 1378, 1381 (Fed. Cir. 2001) (rejecting treating-physician rule in Veterans Affairs benefits cases because the Secretary of Veterans Affairs had not adopted the rule).

3. Respondent's conclusory allegation that the *Regula* decision does not conflict with the decisions of the Third, Seventh, Tenth and Eleventh Circuits on the conflict of interest rule is unsupported. Respondent offers no analysis of these cases, giving the Court no reason to accept his premise that a conflict does not exist. While Respondent relies on *Moran* for this point, *Moran* is no balm for Respondent. *Moran* did not involve a plan funded by a trust with irrevocable contributions and did not even discuss the conflict issue as it applies to this case. Rather, *Moran* dealt with an entity that both decided benefit claims and paid benefits out of its general assets. *See Moran*, slip. op. at 9. The Circuit Courts, except for the Ninth, have consistently treated those types of insurers differently from self-funded plans, like the one in this case that pay benefits out of funds from which the employer can never recall any of the amounts contributed. *See Abnathya v. Hoffmann-La-Roche, Inc.*, 2 F.3d 40, 45 n.5 (3d Cir. 1993); *Gallo v. Amoco Corp.*, 102 F.3d 918, 921 (7th Cir. 1996); *Woolsey v. Marian Lab's, Inc.*, 934 F.2d 1452, 1459 (10th Cir. 1991); *Turner v. Delta Family-Care Disability and Survivorship Plan*, 291 F.3d 1270, 1274 (11th Cir. 2002). The incen-

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[8] Respondent incorrectly states that the Plan claims that ERISA preempts other federal laws. The Plan cites ERISA's preemptive force as evidence that a disruption in the uniformity of plan administration—in this case a clear Circuit conflict—is contrary to ERISA's uniformity goal. This is especially so since this Plan is self-funded. Thus, the savings clause's exception to preemption does not apply. *Moran*, slip. op. at 14 n.6.

tive of a self-funded plan administered by an employer's employees is to provide the promised benefits according to its terms is a critical distinction neither at issue in *Moran* nor dealt with by Respondent. None of these cases recognize a middle ground as inferred by Respondent that some irrevocably-funded trusts are different than others. Thus, this Court's intervention is necessary to resolve this important issue which currently divides the Courts of Appeals.

Respectfully submitted,

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